Supreme Court, U.S.
FILED
JUL 17 1996
CLERK

No. 95-1232

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

General Motors Corporation,
Petitioner,

v.

Roger W. Tracy, Tax Commissioner of Ohio,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

Brief of *Amicus Curiae* Multistate Tax Commission In Support of Respondent

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BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENT[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency formed by the MULTISTATE TAX COMPACT. Historically, the COMPACT was developed through the cooperative efforts of the States and multistate taxpayers in response to the findings and recommendations of the Willis Committee.[2] The purpose of the COMPACT is to seek solutions to issues inherent in "Our Federalism." Federalism recognizes a separate and independent State taxing authority affecting multijurisdictional commerce as a legitimate source of revenue for the States.

Twenty States have adopted the MULTISTATE TAX COMPACT through State legislation. sixteen additional States have ratified the goals of the Commission by joining as associate member States.[3]

The Commission is appearing in this case to defend the qualified sovereignty of the States to impose sales and use taxes with respect to interstate commerce, which the Court has indicated should pay its just share of the cost of State government. A defense appears necessary,

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[1] This brief is filed pursuant to the consent of the parties.

[2] *See* Corrigan, A Final Review, 1989 Multistate Tax Comm'n Rev. 1, 1 and 23. The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate commerce.

[3] The current full members are the States of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the States of Arizona, Connecticut, Georgia, Illinois, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin.

because rapid economic change in the Nation and the world have the potential to influence the operation of State tax systems and raise issues about their compliance with the U.S. Constitution. The Commission seeks to defend existing State tax systems when allegations of discrimination under the Commerce Clause arise from changed economic conditions, rather than any discriminatory intent, and those allegations are not supported by the existing jurisprudence of the Court.

The Commission also seeks a decisional framework from this case that will allow the States and private parties to determine reliably whether changed economic conditions have transformed a lawful taxing system into one that is unlawful. A clear decisional framework will promote the avoidance of disruptive declarations of unconstitutionality that provide windfalls to some taxpayers and undermine the legitimate reliance interests of private parties and of the States in an established source of revenue. Such a framework will allow the States to better understand what they must know to monitor changing economic conditions, for States do not necessarily have ready access to inside information of affected industries. A clear framework that frees States from having to defend tax statutes that are facially neutral and that were not motivated by discriminatory intent would protect this Court from having to sit as a review board to monitor, on a case by case basis, the changing legal status under the Commerce Clause of State taxing statutes in the face of the bountiful economic changes that are the hallmark of a market economy.

SUMMARY OF ARGUMENT

Ohio, like many States, exempts the sale of natural gas from its general sales and use tax if the sale is made by a natural gas public utility. A separate gross receipts

tax, generally more onerous, applies to sales by utilities. At one time, nearly all sales of gas to consumers were made by utilities and thus were exempt from the sales and use tax. After the Federal Government deregulated the gas industry, other options for purchasing natural gas became available, at least to those with leverage in the market place. Large users could bypass utilities and bargain directly with producers, marketers, and brokers (merchants). General Motors, typical of many large users, is able to save money by purchasing natural gas for use in Ohio from merchants rather than from utilities.

Petitioner General Motors challenges the Ohio general sales and use tax exemption for natural gas purchased from utilities, alleging that the Ohio statute discriminates against interstate commerce. Petitioner makes this claim notwithstanding that the Ohio statute treats interstate transactions neutrally on its face, was not adopted with a discriminatory intent, and cannot fairly be said to have a discriminatory impact from the evidence presented. The challenged tax system does not distinguish between: (1) gas produced out-of-state and gas produced in-state; (2) gas bought from out-of-state producers and gas bought from in-state producers; (3) gas bought from out-of-state merchants and gas bought from in-state merchants; or, (4) gas, the title to which passes in Ohio and gas, the title to which passes outside of Ohio. Nothing in the Ohio statute supports the allegation of facial discrimination.

The record below contains no evidence that the Ohio exemption for sales by utilities has a discriminatory effect on interstate commerce. Petitioner bears the burden of proving discrimination in fact, so its claim of discriminatory impact should fail for lack of proof. Nor can Petitioner fairly claim that Ohio had an intent or purpose to discriminate against interstate commerce in enacting its exemption for sales by utilities. The exemption was

adopted decades ago, at a time when virtually all natural gas sales were made through utilities.

General Motors seeks to live in a world free of sales and use taxes with respect to its purchases of natural gas. General Motors apparently has not paid any sales or use taxes to other States on those purchases. If General Motors were freed of the Ohio sales and use tax by this Court, it would have managed to turn the Commerce Clause upside down, to have used it as a shield, not from discriminatory taxation, but from *all* sales and use taxation. This Court, in its recent sales and use tax cases, has shown great sensitivity to the risk of immunizing interstate commerce from paying its fair share of taxation. It should not radically extend the concept of a discriminatory tax so as to depart from the free market rationale that underpins its recent Commerce Clause jurisprudence.

ARGUMENT

General Motors is challenging the constitutionality of the Ohio general sales and use tax. Ohio taxes the sale in Ohio of many types of tangible personal property,[4] including natural gas. Like other States, Ohio also imposes a compensating use tax on the storage, use, or consumption of tangible personal property brought into Ohio.[5] The Ohio sales and use tax contains many exemptions, one of which applies to sales of natural gas by a "natural gas company" that delivers the gas through its own pipelines.[6] A "natural gas company" is defined by statute as a

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[4] Ohio Rev. Code Ann. § 5739.02. ("* * * [A]n excise tax is hereby levied on each retail sale made in this state.")

[5] Ohio Rev. Code Ann. § 5741.02.

[6] Ohio Rev. Code Ann. § 5739.02(B)(7) ("(B) The tax does not apply to the following: * * * (7) Sales of natural gas by a natural gas company, of electricity by an electric company, of water by a waterworks company, or of steam by a heating company, if in each

"public utility" engaged in the delivery of natural gas (utility).[7] Such utilities are subject to extensive regulation by Ohio.[8] They are also subject to a gross receipts tax,[9] the burden of which generally would equal or exceed the burden imposed by the sales and use tax.[10]

Taking advantage of the Federal deregulation of the market for natural gas, General Motors purchased natural gas from producers, marketers, or brokers (merchants) outside Ohio. It paid a use tax to Ohio on its purchase price when the gas was brought into Ohio.[11] By necessity, the gas was delivered to General Motors through interstate pipelines and then through pipelines owned and

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case the thing sold is delivered to consumers through wires, pipes, or conduits . . . ."). The Ohio Supreme Court, in the proceedings below, interpreted this statutory language to mean that a utility must deliver natural gas through its own pipelines to qualify for the exemption from the sales and use tax.

[7] Ohio Rev. Code Ann. § 5727.01.

[8] See Ohio Rev. Code Ann. Ch. 4905 and 4909.

[9] Ohio Rev. Code Ann. § 5727.38. In addition to the general gross receipts taxes, Ohio imposes certain additional gross receipts taxes, the rates of which vary from year to year. Ohio Revised Code Ann. §§ 4905.10 and 4911.18. These taxes are hereinafter referred to collectively as the gross receipts tax.

[10] Like all State sales taxes, the Ohio sales tax is imposed on a tax base that excludes the tax itself (tax-exclusive base); in contrast, the gross receipts tax, like income taxes, is imposed on a tax base that includes the tax (tax-inclusive base). The sales tax rate, tax exclusive, is 5%. The tax-inclusive rate would be 4.75% (.05) x (1 - .05)). The tax-exclusive rate for the gross receipts tax for 1995 is 5.16% and the tax-inclusive rate is 4.91% (general statutory rate of 4.75% plus additional gross receipts taxes totaling 0.16%). Rates for the years at issue in the case are comparable. For detailed calculations, see *Amicus* Brief of Columbia Gas of Ohio, Inc. on Behalf of Respondent at 18-23.

[11] General Motors could offset against its use tax any sales tax it paid to other States on the purchase of its gas. Ohio Rev. Code Ann. § 5741.02(C)(5).

operated by Ohio utilities.[12] If General Motors had purchased the natural gas from a utility, the sale would have been exempt from the sales and use tax.[13] According to General Motors, this statutory system of taxing sales from merchants and exempting sales from utilities discriminates against interstate commerce and thus violates the Commerce Clause.

I. The Ohio Statute Does Not Violate the Commerce Clause

A. Overview

Neither the Court nor commentators have clearly marked the contours of the Commerce Clause discrimination doctrine. Tax statutes challenged as discriminating against interstate commerce can be divided, nevertheless, into two categories: those that are discriminatory on their face and those that are neutral on their face. In general, the Court has upheld State tax statutes that are facially neutral, absent strong reasons to believe that the tax has a discriminatory effect on interstate commerce.

A statute is facially discriminatory if the statutory system as a whole, fairly interpreted, treats out-of-state activities, goods, persons, or transactions less favorably than equivalent in-state activities, goods, persons, or transactions. A facially discriminatory statute will tax "a transaction or incident more heavily when it crosses State lines than when it occurs entirely within the State,"[14] will differentiate "between transactions on the basis of some

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[12] See Petitioner's Brief at 25.

[13] Ohio Rev. Code Ann. § 5739.02(B)(7).

[14] Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 342 (1992), quoting Armco, Inc. v. Hardesty, 467 U.S. 638, 642 (1984).

interstate element,"[15] or will provide "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[16] The burden of making a facial challenge to a statute is heavy, for the Petitioner must establish that the statute could not be constitutional under any existing circumstances.[17] A facially neutral statute does not contain any of the above distinctions.

To determine whether a neutral tax statute has a discriminatory impact on interstate commerce, a court generally would be required to look beyond the statute and engage in fact finding, often extensive. It typically would need to determine the relative burdens imposed by the statute on persons engaged in interstate activities and similarly situated persons engaged in intrastate activities. Such an analysis of the incidence of a tax can be extremely complicated, in substantial part because the person upon whom a statute imposes tax liability may not be the person that actually bears the economic burden of the tax. As this Court has recently emphasized, "'the ultimate distribution of the burden of taxes [may] be quite different from the distribution of statutory liability.'"[18]

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[15] Fulton Corp. v. Faulkner, 116 S.Ct. 848, 854 (1996), quoting Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 332, n.12 (1977).

[16] Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, 511 U.S. 93, 114 S. Ct. 1345, 1350 (1994).

[17] United States v. Salerno, 481 U.S. 739, 745 (1987) (non-tax case).

[18] Fulton v. Faulkner, supra note 15, at 858, citing McLure, Incidence Analysis and the Supreme Court: An Examination of Four Cases from the 1980 Term, 1 Sup. Ct. Econ. Rev. 69, 72 (1982).

The economic incidence of a tax is not possible to determine with accuracy in many cases.[19]

> The actual incidence of a tax may depend on elasticities of supply and demand, the ability of producers and consumers to substitute one product for another, the structure of the relevant market, the time frame over which the tax is imposed and evaluated, and so on.[20]

Whatever economic assumptions, theories, or models are used in the analysis would undoubtedly be open to challenge. Controversy would surround what factors should enter the analysis and what weight they should be given.

Courts have wisely sought to avoid a detailed inquiry into the economic effects of a statute in applying Commerce Clause limitations on State taxing power.

> [C]ourts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.[21]

They have avoided this inquiry with a strong de facto assumption that a facially neutral tax statute is constitutional. That presumption is not rebutted even if a State legislature apparently intended for the burden of the facially neutral tax to be borne by interstate commerce.[22]

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[19] Id. at 859.

[20] Id.

[21] Id., quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 589-590 (1983).

[22] For example, this Court has upheld a significant State severance tax on coal, notwithstanding that 90 percent of the coal was shipped to other States under contracts that apparently required the tax to be paid by consumers in these other States. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). Whether the out-of-state consumers would actually bear the economic incidence of the tax "would require complex factual

The Court has recognized that making "disproportionate impact" the basic test of unconstitutionality under the Commerce Clause "would require a significant and, in [its] view, unwarranted departure from the rationale of [its] prior discrimination cases."[23]

Indeed, a disproportionate impact test would invite nearly endless litigation about the constitutionality of many common features of State taxes. Would a sales tax on hotel rooms be unconstitutional because most of the patrons are from out-of-state? Would a sales tax on rental cars be suspect for similar reasons? Would Nevada's taxes on gambling be unconstitutional because their economic incidence is borne primarily by out-of-state gamblers? In addition, because the underlying facts might change from year-to-year, specific determinations about the constitutionality of a State tax might have only limited value as precedent. For example, a State tax on hotels that was upheld in one year might be again subject to challenge if the State began attracting more tourists.

Notwithstanding the reluctance to do so, a court will strike down a facially neutral tax as discriminatory if it can fairly conclude, without extensive fact finding, that the statute, although drafted in ostensibly neutral terms, is discriminatory in intent or effect. For example, the

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inquiries about such issues as elasticity of demand for the product and alternative sources of supply." Id. at 619 n. 8.

[23] Id. at 619. See also Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), upholding a single-factor apportionment formula, neutral on its face, over Justice Powell's assertion that Iowa was favoring its manufacturers over out-of-state manufacturers. Id. at 283-84 (Powell, J., dissenting). In a non-tax case, the Court echoed the same sentiments quoted in the text: "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Exxon Corp. v. Gov. of Maryland, 437 U.S. 117, 126 (1978).

Court has been willing to look behind facially neutral statutes in situations where a tax or license fee fell upon itinerant salespersons or drummers.[24] Nevertheless, the Court's recent cases striking down statutes because they discriminated against interstate commerce involved statutes that could fairly be described as facially discriminatory rather than as neutral on their face.[25] In most of those cases, the legislatures that enacted the offending statutes could fairly be said to have had a discriminatory intent.

Complementing the strong de facto assumption that facially neutral tax statutes are constitutional, there is a strong de jure presumption against the constitutionality

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[24] See e.g., Nippert v. City of Richmond, 327 U.S. 416 (1946).

[25] See, e.g., Boston Stock Exchange v. State Tax Comm'n, supra note 15 (statute discriminated against out-of-state sales); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (statute exempted products manufactured in the State); New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) (statute favored ethanol produced in the State); Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984) (statute favored exports made from the State); Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, supra note 16 (1994) (statute discriminated against out-of-state garbage); Associated Industries of Missouri v. Lohman, 114 S. Ct. 1815 (1994) (statute imposed higher tax on out-of-state goods); Maryland v. Louisiana, 451 U.S. 725 (1981) (statute, *inter alia*, imposed heavier tax on gas sold to other States); Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance, 505 U.S. 71 (1992) (statute exempted dividends received from U.S. corporations); Armco v. Hardesty, supra note 14 (statute discriminated against out-of-state manufacturing); Tyler Pipe v. Washington, 483 U.S. 232 (1987) (statute discriminated against out-of-state sales); West Lynn Creamery v. Healy, 114 S. Ct. 2205 (1994) (statutory system discriminated against out-of-state milk); Fulton Corp. v. Faulkner, supra note 15 (statutory system favored domestic corporations); Chemical Waste Management, Inc. v. Hunt, supra note 14 (statute imposed higher charge on out-of-state garbage).

of facially discriminatory statutes. Of course the Court has not held that a State statute that is facially discriminatory is necessarily unconstitutional.

B. The Ohio Taxing System Does Not Discriminate on Its Face Against Interstate Commerce

In its brief, Petitioner asserts that the Ohio taxing system, with its exemption for natural gas purchased from utilities, discriminates against interstate commerce. Petitioner does not state whether it is alleging facial discrimination or discrimination in fact.[26] Indeed, it provides little by way of argument or citation to the Ohio tax statute in support of its assertion of discrimination. Pages 11-25 of Petitioner's brief address the issue of Commerce Clause discrimination. Nearly all that discussion (Pages 12-25), as the section headings of the brief indicate,[27] deal with possible issues that would be relevant to this case only upon a finding that the Petitioner has made out its case that the Ohio taxing system is discriminatory.

Petitioner's affirmative argument that the Ohio statute is discriminatory on its face is set forth on p. 11-12 of its brief. Petitioner presents its argument by stringing to-

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[26] At one point in its brief, Petitioner states explicitly rather than by inference that the Ohio "taxing statute facially discriminates against interstate commerce. . . ." Petitioner's Brief, at 17. See note 37 infra and accompanying text.

[27] Section A on p. 12 is entitled, The *Discriminatory Tax* Cannot Be Saved Because It Also Discriminates Against Some In-State Commerce (emphasis added). Section B on p. 17 is entitled, The *Discrimination* Cannot Be Justified On The Theory That The Use Tax On Out-Of-State Purchases "Compensates" For The Gross Receipts Tax On Local Public Utilities (emphasis added). Section C on p. 18 is entitled, The *Discrimination* Cannot Be Justified On The Theory That Ohio Has An Interest In Favoring Local Public Utilities (emphasis added).

gether snippets of Commerce Clause rhetoric that have nothing to do with the facts of this case. Petitioner states:

> This Court has long recognized that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (footnote omitted). "The few simple words of the Commerce Clause" were the Framers' principal mechanism for ensuring that "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation" would not be repeated under our current Constitution. Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979). Here, however, the Ohio taxing system implements precisely the "economic Balkanization" which this Court has long held unconstitutional—Ohio taxes out-of-state natural gas, but exempts gas purchased from its own public utilities. This system of taxation creates a preference for gas sold by an Ohio public utility—and, correspondingly, it creates a disincentive to purchase gas from any other source, including *all* out-of-state sources.[28]

This characterization of the Ohio statute is mistaken. Petitioner would have this Court believe that Ohio facially discriminates by taxing "out-of-state natural gas"—presumably gas purchased or produced out-of-state—and exempting gas purchased from "its own" public utilities. Citations to the Ohio statute are not provided to support this position, nor could they be, for the statute does not so provide.

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[28] Petitioner's Brief at 11-12 (emphasis in original).

The statute unquestionably provides that natural gas sold by merchants is taxable whether or not the gas was produced within or without Ohio or purchased within or without Ohio.[29] In addition, the exemption for sales by natural gas utilities unquestionably is available whether the gas sold is produced within or without Ohio or is purchased within or without Ohio.[30] No special burden is placed on the sale of natural gas because of the interstate characteristics of its sale or its production.

Petitioner attempts to taint the Ohio sales tax by asserting, imprecisely and inaccurately, that it "creates a preference for gas sold by an Ohio public utility—and, correspondingly, it creates a disincentive to purchase gas from any other source, including *all* out-of-state sources."[31] Petitioner does not explain what it means by "source." If source is meant to refer to place of production, then Petitioner is clearly wrong.[32] If "source" is meant to refer to the State of purchase, Petitioner is again clearly wrong. Natural gas purchased from merchants in Ohio is taxed in exactly the same way as natural gas purchased from merchants outside of Ohio.

What may not be entirely clear from the statute is the treatment of natural gas purchased from out-of-state utilities for use in Ohio. There is no Ohio case law directly on point. The Ohio statute, however, provides an exemption from the use tax if the acquisition would, "if made in Ohio, . . . be a sale not subject to the [sales] tax . . . ."[33] This language could be interpreted by the Ohio courts to mean that an acquisition from a non-Ohio utility would

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[29] See Ohio Rev. Code Ann. §§ 5739.02 and 5741.02.

[30] Ohio Rev. Code Ann. § 5739.02(B)(7).

[31] Petitioner's Brief at 12 (emphasis in original).

[32] Ohio Rev. Code Ann. § 5739.02(B)(7).

[33] Ohio Rev. Code Ann § 5741.02(C)(2).

be exempt if made under the same conditions that are required for the exemption to apply to acquisitions made from Ohio utilities.

Under accepted canons of interpretation, this Court should presume that the Ohio courts would construe the Ohio statute so as to preserve its constitutionality. To act otherwise would put many innocent exemptions at risk. For example, assume that a State provides an exemption from its sales tax for sales of books made by museum stores that are operated as charitable organizations. The typical use tax statute might be interpreted to grant a comparable exemption for books purchased from an out-of-state museum and brought into the State. The sales tax exemption for museum sales should not be jeopardized simply because the State courts have not specifically ruled on the availability of the exemption.

In an apparent attempt to make out a case of facial discrimination, Petitioner characterizes the Ohio statutory system as discriminating against goods delivered into the State by "common carriage" rather than by the seller's own local distribution network.[34] Based on its characterization of the Ohio tax system, Petitioner goes on to argue that if the Court were to uphold that system, it also would have to uphold a State statute that exempted local newspapers that utilized their own delivery services while taxing out-of-state newspapers that contracted with third parties for delivery services. "The result would plainly be favoritism of the local newspa-

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[34] Petitioner's Brief at 21-22. Petitioner's dichotomy between goods delivered by common carrier and goods delivered by a local distribution network is false because the only way natural gas can be delivered to Ohio customers is through the pipelines owned and operated by the local utility serving those customers.

per."[35] A holding for Respondent, however, would not have that implication.

A fundamental fallacy in Petitioner's argument by analogy is that nothing in the definition of a newspaper is dependent on the manner in which newspapers are delivered to customers. In contrast, the essential characteristic of an Ohio natural gas utility is that it operates pipelines that deliver natural gas to its Ohio customers. That characteristic is a necessary part of the definition of a natural gas utility, not a characteristic that distinguishes some natural gas utilities from other natural gas utilities. Thus, a natural gas utility engaging in sales of natural gas not delivered by the utility's own pipeline would not meet the definition of a natural gas utility and would be treated as a merchant making taxable sales.

The hypothetical statute suggested by Petitioner that would limit a sales tax exemption to newspapers utilizing their own delivery services would not be using the limitation to define a newspaper. Instead, it would be imposing a separate and independent condition on the availability of the exemption. That is, a newspaper company remains a newspaper company whether it delivers its newspapers to customers through its own distribution network or uses third parties to make the deliveries.

For the Petitioner's argument by analogy to have applicability to this case, Petitioner must assert that a State cannot exempt certain sales from the sales tax if the definition of those sales has an inherent geographical limitation. For example, suppose that a State wishes to exempt newspapers sold through "vending machines" from its sales tax. To implement that exemption, it defines a "newspaper vending machine" as a coin-operated

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[35] Petitioner's Brief at 24. Petitioner provides other variations on this same theme. See id. at 23-24.

device that delivers the newspaper to the consumer at the place of purchase. Such vending machines are a common fixture in many urban areas.

Assume that all existing newspaper vending machines in the State are owned by local newspaper companies, that some local newspapers do not have any vending machines, and that the existing technology allows for the distribution of only one type of newspaper per machine. Assume also that the State's intent was not discriminatory but instead was motivated by administrative concerns about collecting the proper amount of tax or by a desire to encourage easy access by out-of-town workers and individuals unable to get home delivery.

Under the Petitioner's argument by analogy, the exemption should be unconstitutional as facially discriminatory because it applies only to newspapers utilizing their own local delivery services, notwithstanding that in-state newspapers not sold through vending machines would be taxable the same as out-of-state newspapers. Petitioner's implicit argument has no merit. No one could seriously contend that the definition of "vending machine" in the tax statute resulted in facial discrimination against interstate commerce. Nor is the statute tainted by any protectionist goals of the legislature.[36] In such circumstances, the exemption for newspapers sold through vending machines would pass constitutional muster as a facially neutral statute under existing Commerce Clause precedents.

Petitoner's attempt to prove that the Ohio tax statute facially discriminates against interstate commerce is verbal strong arming. Petitioner asserts that "[w]here, as

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[36] If Ohio had such an exemption, newspapers purchased from out-of-state vending machines and brought into the State presumably would be exempt from the use tax under Ohio Code Rev. Ann. § 5741.02(C)(2).

here, a taxing statute facially discriminates against interstate commerce. . . ."[37] As discussed above, however, it offers no statutory citations or analysis to support that bare assertion. The reason is simple—the statutory system, viewed as a collection of parts and as a totality, is facially neutral. It does not distinguish between: (1) natural gas produced out-of-state and gas produced in-state; (2) gas bought from out-of-state producers and gas bought from in-state producers; (3) gas bought from out-of-state merchants and gas bought from in-state merchants; or (4) gas the title to which passed in Ohio and gas, the title to which passed outside of Ohio. In short, the exemption and the tax do not rely on any criteria that support a characterization of facial discrimination.

C. Petitioner Has Not Established that the Ohio Legislature Harbored a Discriminatory Intent

Much of Commerce Clause jurisprudence on discrimination has been concerned with the prevention of economic protectionism by the States. Facially discriminatory statutes typically reflect protectionist goals.[38] Cases involving facially neutral statutes in which the Court was willing to look behind the statute involved taxes, levies, or fees that could be characterized as ones in which the State intended to disadvantage out-of-state competitors, activities, or products. The various cases cited by Petitioner to support its Commerce Clause claim also have been described by this Court in protectionist terms.

The Ohio exemption for natural gas sold by utilities cannot be similarly described. The exemption was a

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[37] Petitioner's Brief, at 17. The statement is made in Section B where the Petitioner is addressing Ohio's defenses to what is already assumed to be a facially discriminatory statute.

[38] See supra note 25 and accompanying text.

feature of the first Ohio sales and use tax, enacted in 1934.[39] At that time, the gas industry had not yet been deregulated, and in-state and out-of-state merchants were unable to sell natural gas to Ohio customers because they lacked the means of delivery. The Ohio legislature could not have had protectionist motives when no reasonable possibility of competition existed.

No legislative history exists regarding the Ohio exemption for utilities. Such exemptions are common among the States, however, and probably can be explained by three factors. First, utilities are typically subject to gross receipts taxes, as they are in Ohio.[40] Those taxes, like sales taxes, typically get passed through to consumers. They have the political charm, however, of being invisible to those consumers. Because consumers typically were already paying the gross receipts tax, which was buried in the price paid for their utilities, legislators may not have wanted to impose a second excise tax—especially one that would be separately stated and would be visible to the customer.

Second, sales taxes often contain exemptions for what are perceived to be necessities, such as food and utilities. Although some States limit their exemption to sales of natural gas made to residential users, Ohio's exemption is broader and extends to all sales of natural gas by utilities to their customers. The Ohio legislature might not have wanted to distinguish between gas used for heating homes and gas used for heating offices and factories. Perhaps, in the midst of the Great Depression, the legislature did not want to levy a sales tax in addition to the gross receipts tax on utilities for fear of increasing the

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[39] 115 Ohio Laws Tt. II 306, 307-8 (1934).

[40] 111 Ohio Laws 399, 412-3 (1910).

cost of a business input for commercial and industrial users.

Third, imposing a sales tax on sales by a utility of natural gas presents some technical difficulties because the utilities charge their customers a bundled price for natural gas that reflects not only the charge for the gas but also the charge for its delivery. Unbundling such prices is important because the delivery services are not taxable under Ohio law. The unbundling is a fairly complex matter, however, in part because the utilities are required under Ohio law to charge customers a uniform price for a unit of natural gas, whereas the costs for delivering a unit of natural gas are unlikely to be uniform for all customers.

D. Petitioner Has Not Established that the Ohio Taxing System Has a Discriminatory Impact

Petitioner invites the Court to look behind the Ohio tax statute and hold that the taxing system has a discriminatory impact on interstate commerce. In the past, the Court has found similar invitations to be unappealing, recognizing the "general difficulty of comparing the economic incidence of State taxes paid by different taxpayers upon different transactions."[41] Undertaking an economic analysis here is both unappealing and essentially impossible, because the Petitioner did not introduce any evidence as to the practical effects of the exemption. Instead, Petitioner simply asserts, speculates, raises theoretical possibilities, and crafts hypotheticals about the impact of the Ohio system on interstate commerce. In the absence of strong empirical evidence of discrimination in fact, the

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[41] Fulton, supra note 15, at 859.

Petitioner's discretionary-impact argument should fail for lack of proof.[42]

From the facts in the record, discrimination in fact against interstate commerce appears exceedingly unlikely, for at least two reasons. First, the exemption complained of by Petitioner applies to sales by regulated utilities and not to sales by merchants. For this differential treatment to raise the specter of constitutionally suspect discrimination, Petitioner must establish at a minimum that merchants and utilities are sufficiently similar in their businesses that a failure by Ohio to provide them with functionally equivalent treatment raises an issue of discrimination under the Commerce Clause.[43] It is clear from the record, however, that merchants and utilities operate under significantly different legal and economic conditions.[44]

Second, Petitioner must provide proof that the Ohio tax system as a whole imposes significantly heavier taxes on interstate commerce than on intrastate commerce,

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[42] "The burden to show discrimination rests on the party challenging the validity of the statute . . . ." Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). Compare Moorman Mfg. Co. v. Bair, supra note 23 (Commerce Clause claim denied for failure to prove multiple taxation in matter involving a facially neutral statute) with Armco, Inc. v. Hardesty, supra note 14 (Commerce Clause claim upheld without necessity of proving multiple taxation in matter involving a facially discriminatory statute).

[43] See, e.g., Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. 66 (1989) (allowing differential tax treatment of oil producers and retailers, both engaged in the sale of oil); Alaska v. Arctic Maid, 366 U.S. 199 (1961) (allowing differential treatment of fish processed by freezer ships and fish processed by local canneries); Dumbar-Stanley Studios v. Alabama, 393 U.S. 537 (1969) (allowing differential tax treatment of traveling photographers and photographers operating out of fixed locations).

[44] For an extended discussion of those differences, see infra at pages 27-28.

notwithstanding the fact that Ohio utilities pay a substantial gross receipts tax with respect to their sales of gas.[45] That tax is likely to exceed the sales tax paid with respect to sales by merchants in most cases.[46] Of course Petitioner has introduced no evidence about the overall impact of Ohio taxes on interstate commerce.[47]

Even if the Petitioner had provided proof below that the Ohio tax system, in its totality, adversely affected interstate commerce, it still would have failed to demonstrate that Ohio has violated the Commerce Clause. Because the Ohio system is facially neutral and was not adopted with a discriminatory intent, the burden on the Petitioner to prove a Commerce Clause violation is, and should be, very high.

It is not enough to make out a case of in-fact discriminatory impact to show that the burden of a questioned tax is borne primarily by interstate commerce when the taxing system is facially neutral and was not adopted with a discriminatory intent. In these circumstances,

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[45] See, e.g., Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 69 (1962).

[46] See note 10, supra. See also *Amicus* Brief filed by Columbia Gas of Ohio, Inc. on Behalf of Respondent, at 18-23.

[47] The point is not that the gross receipts tax on utilities may constitute a compensatory tax, as described in Fulton Corp. v. Faulkner, supra note 15 at 854-5. Whether a tax is compensatory is a relevant issue only if some other tax has been shown to be discriminatory on its face. In making its argument that the Ohio sales and use tax is discriminatory in fact, Petitioner is assuming, for purposes of that argument only, that the tax is not facially discriminatory. Accordingly, the compensatory-tax doctrine is not relevant here. In determining whether the Ohio sales and use tax is discriminatory in fact, Petitioner must show that the entire Ohio tax system, including the gross receipts tax and any other special taxes on utilities, results in a substantial discriminatory burden on interstate commerce.

Petitioner should be required to show that the Ohio taxing system presents a palpable and serious threat to the primary values that underlie the Court's Dormant Commerce Clause jurisprudence. Any less stringent requirement would impose unreasonable burdens on the States. A lower requirement might force the States to modify their tax systems or engage in costly litigation whenever a taxpayer is able to introduce evidence that changing economic conditions have caused a taxing system of long standing to affect interstate commerce in some new and unanticipated way.

II. Authorities Cited by Petitioner Do Not Support Its Position

The cases Petitioner relies on to support its argument that the Ohio statute discriminates against interstate commerce actually undercut that argument and serve to underscore its lack of support in the case law. For example, Petitioner cites *Halliburton Oil Well Cementing Co. v. Reily*[48] for the proposition "that when a State provides an exemption from sales tax, it must provide a strictly equal exemption from use tax for the same goods when purchased outside the State."[49] Petitioner apparently reads *Halliburton* to mean that any time a State grants an exemption for the sale of a product under specific conditions, it must extend that same exemption to the purchase of that product even if that purchase occurs under completely different circumstances. Petitioner argues:

> [T]he decision of the Ohio Supreme Court sanctioned the exemption from sales tax of in-state

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[48] Supra note 45.

[49] Petitioner's Brief at 12. Actually, the facts in Halliburton involve the manufacture and not the purchase of a good outside the taxing State.

> purchases of natural gas from local public utilities while out-of-state purchases were subjected to a use tax. This favoritism violates the Commerce Clause.[50]

But *Halliburton* never held what Petitioner would read into it. *Halliburton* involved the use taxation of specialized oil equipment that the taxpayer manufactured outside of Louisiana. When this equipment was brought into Louisiana, the State levied a use tax on the cost of the equipment. The statutory measure of cost included the value of labor and overhead that entered into the manufacturing of the machinery. Labor and overhead would have been excluded from the sales tax base if the same machinery had been manufactured in Louisiana. Consequently, the Louisiana sales and use tax facially discriminated against machinery manufactured outside the State and, if left intact, would have encouraged some taxpayers to manufacture in Louisiana, leading to the "economic Balkanization" that the Court has associated with unconstitutional discrimination.

In sharp contrast to Louisiana's tax system that was rejected in *Halliburton*, Ohio's sales and use tax is geographically neutral. All gas purchased from utilities is exempt, regardless of where produced, and all gas purchased from other sources is taxable, regardless of where produced. Under Petitioner's reading of *Halliburton*, if Ohio were to exempt from its sales tax books purchased at a museum bookstore, it could not levy its sales or use tax on books bought from other vendors, including books bought from out-of-state. Nowhere does *Halliburton* set forth or imply such an untenable view.

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[50] Petitioner's Brief at 12.

The Petitioner's reliance on *Bacchus Imports, Ltd. v. Dias*[51] further illustrates the weakness in its discrimination argument. *Bacchus* struck down Hawaii's exemption from its liquor excise tax for locally produced brandy and wine. "[T]he effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products."[52] Petitioner states:, "The same is true of the Ohio exemption: it 'applies only to locally-[sold gas], even though it does not apply to all such products.'"[53]

Instead of supporting Petitioner, *Bacchus* spotlights a fundamental defect in Petitioner's discrimination argument. The fatal flaw in Hawaii's exemption was that it was limited to locally produced wine and brandy. But Ohio does not limit its exemption to locally produced gas; its exemption is geographically neutral.

Indeed, Petitioner attempts to disguise this important difference through a self-serving paraphrase of the language quoted above from *Bacchus*. In that case, the Court describes the Hawaii exemption as clearly discriminatory "in that it applies only to locally *produced* beverages. . . ."[54] When Petitioner paraphrased this language in the context of its case, it did not simply substitute "gas" for "beverage," which would have been straightforward. Instead, it substituted "locally *sold* gas" for "locally *produced* beverages."[55]

If the quotation from *Bacchus* were reproduced accurately with "gas" inserted for "beverage," it would read as follows: "the effect of the exemption is clearly dis-

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[51] Supra, note 25.

[52] Id. at 271, cited in Petitioner's Brief at 15.

[53] Id. (square brackets supplied by Petitioner).

[54] Id. at 271 (emphasis added).

[55] Petitioner's Brief at 15 (emphasis added).

criminatory, in that it applies only to locally produced gas, even though it does not apply to all such products." Stated accurately, *Bacchus* has no relevance to Ohio's exemption, which is neutral as to where gas is produced. The exemption applies regardless of where the gas was produced. Moreover, it was undisputed in *Bacchus* that "the purpose of the exemption was to aid Hawaii industry,"[56] whereas Ohio had no discriminatory intent in adopting its exemption.

Whereas a State tax exemption limited to goods produced within that State is invalid under *Bacchus*, an exemption limited to goods sold or used within a State is not constitutionally suspect. All sales tax exemptions apply to locally sold products, and all use tax exemptions apply to locally used products. Such a geographical condition is inherent in the structure of a sales and use tax.

Other cases Petitioner relies on are also irrelevant. For example, Petitioner cites *Boston Stock Exchange v. State Tax Comm'n* for the

> ironclad rule that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"[57]

The New York statute at issue in *Boston Stock Exchange*, however, was facially discriminatory, imposing a higher tax on out-of-state sales of stock than on New York sales. The expressed intent of the New York legislature was to use the higher tax to divert business from out-of-state exchanges to the New York exchange. The taxpayer did not need to prove that the New York statute discriminated against interstate commerce. The Court

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[56] Supra note 25 at 271.

[57] Petitioner's Brief at 20.

held that "no State may discriminatorily tax the products manufactured or the business operations performed in any other State."[58]

The Ohio statute is consistent with the holding in *Boston Stock Exchange*. Ohio does not discriminate based on where the sale of natural gas takes place or where the gas is produced. And gas sold by an out-of-state utility is exempt to the same extent that a similar sale would have been exempt if made by an Ohio utility. Consequently, to paraphrase the holding in *Boston Stock Exchange*, supra, Ohio does not discriminatorily tax the products (gas) manufactured outside Ohio nor does it discriminatorily tax the business operations performed outside of Ohio.

In addition, unlike the situation in *Boston Stock Exchange*, Ohio's exemption was not motivated by protectionism. Furthermore, the Ohio statute is facially neutral and the Petitioner has not submitted any evidentiary proof of its claim of discrimination in fact.

III. A Decision for Petitioner Would Radically Extend Existing Commerce Clause Doctrine and Would Frustrate Essential State Tax and Regulatory Power

For reasons discussed above, a decision for Petitioner in this case would alter substantially the Court's current Commerce Clause doctrines. In effect, the Court is being asked to hold that a tax statute that is facially neutral, that has no discriminatory intent, and that cannot fairly be said to have a discriminatory impact from the evidence presented, nevertheless violates the Commerce Clause because it fails to treat natural gas public utilities under its taxing system the same as in-state and out-of-state natural gas merchants. In substance, Petitioner has made out the rudiments of an equal protection argument, which

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[58] Id. at 337.

this Court would not accept under current doctrine unless it concluded that Ohio has no rationale basis for distinguishing in its taxing system between regulated natural gas utilities, which are subject to a gross receipts tax and extensive State regulation, and natural gas merchants.

To convert its makeweight equal protection argument into a Commerce Clause argument, Petitioner and its *amici curiae* raise the specter of economic Balkanization if the Ohio taxing system is allowed to stand. The Chamber of Commerce *et al.*, as *amici curiae*, assert that such State taxing systems will tilt the allegedly level playing field in favor of local commerce. It goes on to assert:

> For a potential purchaser of natural gas faced with the question whether to purchase from an Ohio LDC, and thus free of sales and use tax, or, alternatively, to purchase the gas from an out-of-state seller, and pay a use tax on the gas, the choice is obvious. Assuming the price for the gas is the same, the purchaser will invariably choose to purchase from the local seller.[59]

Actually, the choice is between purchasing from either an in-state or out-of-state utility and being free of the sales and use tax or purchasing from an in-state or out-of-state merchant and being subject to the sales and use tax.

Of course when General Motors was faced with the choice of buying from a utility or buying from merchants, it chose to purchase its natural gas from merchants, strongly suggesting the falsity of the assumption that the pre-tax gas prices in the two markets are the same. Indeed, the Ohio system for regulating natural gas utilities almost guarantees that prices in the two markets will be

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[59] *Amicus* Brief of Chamber of Commerce of the United States *et al* at 10.

different. Nor is there anything that Ohio can do, short of deregulating natural gas utilities, to remove the price differences in those markets.

A gas utility has a natural monopoly for the delivery of gas to customers. It is the only economic player with pipelines connected to a particular set of customers, and no potential competitor could build its own competing pipelines without incurring ruinous costs and creating significant economic waste. Every State has responded rationally to this economic reality by giving legislative sanction to the natural monopolies of its utilities and then regulating those utilities to prevent them from exploiting their monopoly position to impose economic harm on the community of gas users. This regulatory system is not economic Balkanization. On the contrary, it is essential to prevent abuse of the free market.

Under its regulatory system, Ohio requires its utilities to sell natural gas at the same unit price to all its customers, without reference to the costs incurred in delivering natural gas to those customers. The U.S. Post Office follows a comparable policy in charging the same price for the delivery of first-class mail to rural and urban addresses, notwithstanding differences in delivery costs. Such uniform unit pricing systems have obvious social implications that many people believe are desirable. Those systems also offer some significant administrative advantages, due to the accounting difficulties that would arise in determining the unit costs of delivery and in collecting differential amounts from customers. The uniform pricing rule and various other special pricing rules skew the price of gas sold by utilities from the price that would be set by the market without State intervention.

Traditionally, the Court has used its Dormant Commerce Clause jurisprudence to prevent States from overreaching and saddling taxpayers engaged in interstate

commerce with discriminatory or excessive tax burdens. Threats to the free trade values of the Commerce Clause do not arise, however, only from excessive State taxation. They also are presented by the undertaxation of interstate commerce, as the Court has clearly acknowledged in some recent cases. In *Goldberg v. Sweet*,[60] for example, the Court upheld the constitutionality of a State excise tax on interstate telephone calls, thereby avoiding the immunization of interstate telephone services from any State sales taxation. Similarly, in *Jefferson Lines*,[61] the Court upheld the constitutionality of a sales tax on the sale of a ticket for interstate bus transportation, thereby avoiding a holding that would have had the practical effect of immunizing interstate bus trips form State sales taxation.

In this case, General Motors seeks the unfair advantage of operating in a tax-free world with respect to its purchases of natural gas.[62] Ohio is the logical State to impose sales and use taxes on natural gas used within its borders and has enacted legislation that does so.

In arguing for reversal of the decision below in favor of Respondent, Petitioner is arguing in effect to turn the clock back to an earlier era when the Court viewed interstate commerce as wholly immune form State taxation in any form. This quaint position slowly yielded over time to the modern view that interstate commerce may be made to pay its fair share of State expenses and "'to contribute

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[60] 488 U.S. 252 (1989).

[61] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995).

[62] It is safe to surmise General Motors did not pay a sales or use tax on the gas in issue. If it did, Ohio would have allowed a credit against the Ohio use tax, thereby eliminating most or all of the potential benefit to General Motors from bringing this suit. The record below indicates that General Motors did not claim a credit against the Ohio use tax for sales taxes paid to other States.

to the cost of providing *all* governmental services, including those services from which it arguably receives no direct benefit.'"[63] Whatever the meaning of the phrase "fair share," it does not mean an immunity from taxation.

Striking down the current Ohio taxing system would not strike a blow against economic Balkanization. On the contrary, it would undermine the ability of Ohio and the other several States to impose fair and reasonable sales and use taxes on natural gas used within their borders. Fair taxation of products moving in interstate commerce is an important prerequisite for the level playing field that Petitioner claims to support and that would be promoted by a decision for Respondent in this case.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Ohio should be sustained.

Respectfully submitted,

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[63] Goldberg v. Sweet, supra note 60 at 267 (1989), quoting Commonwealth Edison Co. v. Montana, supra note 21 at 627 n. 16 (1981) (emphasis in original).